

Howard Barthelmass Painting Co., Inc. and District Council No. 2, of the Brotherhood of Painters and Allied Trades, AFL-CIO. Case 14-CA-16035

23 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 24 February 1983 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The General Counsel and Respondent each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt his recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Howard Barthelmass Painting Co., Inc., Kirkwood, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel has excepted to the judge's incorrect characterization of the parties' trial stipulation (G.C. Exh. 2) as stating, "Respondent has conceded that it has *not* employed unit employees from January 6 through July 1982," instead of "Respondent has conceded that it *has* employed unit employees from January 6, through July 1982." (Emphasis added.) This inadvertent error is hereby corrected.

² Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

DECISION

PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge. This proceeding¹ under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq. (Act), was litigated before me in St. Louis, Missouri, on October 14,

¹ Complaint issued on July 28 by NLRB Regional Director for Region 14, growing out of charge filed by above Union on July 2 as amended on July 26, 1982.

1982, with all parties represented throughout by counsel and afforded full opportunity to present evidence and contentions, as well as to file posttrial briefs received, after unopposed application by Respondent for time extension, by December 2, 1982. Record and briefs have been carefully considered.

The issues are whether Respondent Employer has violated Section 8(a)(5) and (1) of the Act by not reporting to Charging Party Union earnings and deductions from earnings paid to Respondent's employees, and by not making payments to various union funds (pension, welfare, vacation, and apprenticeship and training), under provisions of a subsisting collective agreement to which Respondent was bound.

On the entire record and my observation of the testimonial demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent has been and is a Missouri corporation with its only office and place of business in Kirkwood, Missouri, engaged in the painting contracting business. In the course and conduct of that business in the representative 12-month period ending June 30, 1982, immediately antedating issuance of the complaint, Respondent purchased and caused to be transported to and received at its Kirkwood facility paints and other commodities valued in excess of \$50,000, including over \$50,000 worth originating from places outside Missouri.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and Charging Party Union a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At root here is Respondent Employer's 1982 obligations under its current (January 2, 1980–December 31, 1982) collective agreement—the latest of such for at least 30 years—to which, while not a direct signatory, it is concededly² bound. Respondent admits Charging Party Union has been and is the designated exclusive collective-bargaining representative of its painters, an appropriate bargaining unit, covered thereby.³ That agreement (G.C. Exh. 3) inter alia obligates Respondent to make payments, on behalf of its unit employees, to the Union's welfare, pension, vacation, and apprenticeship and journeyman training funds; with reports thereon, as therein specified, to the Union.

In its answer, Respondent has admitted it has not made such payments or reports. In a trial stipulation (G.C. Exh. 2), Respondent has conceded that it has not employed unit employees from January 6 through July 1982. It is stipulated that prior to January 6, 1982, Re-

² October 14, 1982 trial stipulation, G.C. Exh. 2. See also Respondent's admission in answer, in part, of complaint par. 6.

³ See Respondent's admission, in its answer, of complaint pars. 6, 7, and 5; also October 14, 1982 trial stipulation, G.C. Exh. 2.

spondent was current in those payment and reporting obligations.

Respondent's defense under these circumstances appears to center around (1) the disposition, by settlement, of a 1981 U.S. District Court civil suit (E.D. Mo., E. Div., No. 81-0782-C[3]; R. Exh. 2) involving Respondent's alleged failure to meet its 1981 obligations to the Union under the collective agreement; and (2) pendency of a 1982 U.S. District Court suit (same court; No. 82-903C[C], R. Exh. 6) relating to Respondent's 1982 obligations under the collective agreement. The first of these actions was resolved by settlement (R. Exh. 1); the second was pending unresolved at the time of the instant trial. Testifying as Respondent's witness, its vice president and executive chief, Howard Gary Barthelma, conceded that it has made none of the payments in question since January 1982.⁴

Respondent appears to contend that the District Court suit or suits have in some way preempted or canceled out the jurisdiction of the Board here, seemingly on the theory that the Union thereby elected to treat the matter as a mere "collection" case. I cannot agree. The District Court lacks jurisdiction⁵ over the question of whether Respondent has engaged in unfair labor practices under the Act; and it has long been settled that it is not a defense to violation of the Act that civil suit lies for violation of a collective agreement.⁶ Indeed, Respondent's unit employees have been on strike against Respondent since the end of July 1982, in exercise of yet another right independent of and in no way precluded by the District Court "collection" suit.

Respondent's further contention that it is in some way relieved from its 1982 obligations under the subsisting collective agreement because of the Union's alleged failure to make proper allocations among its various funds of the amounts paid by Respondent under the 1981 settlement agreement also holds no water. To begin with, assuming arguendo that there is such an obligation and further assuming that Respondent is a proper party to enforce it, such a contention should have been addressed to the District Court in connection with the 1981 contract litigation and the execution of the settlement agreement therein. Furthermore, it would appear, including

from the testimony of Respondent's executive Howard Barthelma—himself a Charging Party union member—that payments have been made by the Union to unit and other union members out of the Union's general reserves, rendering academic the internal union inter-fund accounting procedures observed; and that, thus, no prejudice to any employee or to Respondent has been shown. Moreover, payments required for 1982 by the collective agreement remained unaffected by the 1981 lawsuit, such 1982 payments being required under the terms of the subsisting collective agreement.

Respondent's agreement that it is relieved from its bargaining obligation under the Act because of alleged financial inability (not here factually established) to comply with its contractual obligations is likewise without merit. See, e.g., *Inland Cities, Inc.*, 241 NLRB 374, 379 (1979), enfd. 618 F.2d 117 (9th Cir. 1980); *Phoenix Air Conditioning*, 231 NLRB 341, 342 (1977), enfd. 580 F.2d 1053 (9th Cir. 1978); *Ellis Tacke Co.*, 229 NLRB 1296 (1977); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974); *Osage Mfg. Co.*, 173 NLRB 458, 461-462 (1968).

Since Respondent's unit employees were undeniably entitled to the benefits of the payments here in question, as required by the terms of the collective agreement to which Respondent was concededly bound, Respondent's unilateral discontinuance of those payments (as well as its failure to supply related required reports) after January 13, 1982, constituted a change in the terms and conditions of their employment as well as failure to bargain with the employees' collective-bargaining representative. That this was and continues to be in violation of Section 8(a)(5) and (1) of the Act is clear and is so found and determined. Cf., e.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *Electri-Flex Co.*, 228 NLRB 847 (1977), enfd. 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978); *George E. Light Boat Storage*, 153 NLRB 1209 (1965), enfd. 373 F.2d 762 (5th Cir. 1967); *Toffenetti Restaurant Co.*, 136 NLRB 1156 (1962), enfd. 311 F.2d 219 (2d Cir. 1962). Neither agreement by the Union to forego nor waiver of such payments, nor other valid basis or justification for Respondent's failure to make them (or to report thereon) since January 13, 1982, has been here established, by substantial credible evidence as required.⁷

On the foregoing findings and the entire record, I state the following

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted here.

⁴ Although Barthelma contends, without proof, that Respondent has withheld 1982 payments because of the Union's alleged noncompliance with the aforesaid 1981 settlement agreement, it is noted that the 1981 settlement agreement requires Respondent to "remain current in contribution payments and report filings . . . through December 31, 1982" (R. Exh. 1), and that there is no claim here that any such contention has been made to the District Court in support of any application to set aside the 1981 settlement agreement or for other relief; and that no payments with relation to 1982 have been made, set aside, or earmarked. It does appear, however, that Respondent, for some unexplained reason, did make reports and payments to the Union's welfare and pension plans for the weeks ending January 13 and March 17, 1982 (*only*; G.C. Exhs. 7, 4)—throwing doubt on Respondent's contention that it made no 1982 payments because of questions arising out of the 1981 settlement agreement. (It is to be noted that Respondent's report for March 17, 1982 [G.C. Exh. 4] withheld payment *only* for union dues checkoffs, as to which the extent of its liability, if any, was still unresolved at that time under the 1981 agreement. Union dues checkoffs are not involved in the instant proceeding.)

⁵ Except, of course, for injunctive relief or subpoena enforcement, not here involved.

⁶ See, e.g., *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962).

⁷ Any such agreement or waiver may not be implied, but would of course have to be unambiguously established in the clearest of terms—totally lacking here. Cf., e.g., *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 750-754 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *General Electric Co. v. NLRB*, 414 F.2d 918 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970); *NLRB v. Item Co.*, 220 F.2d 956, 958-959 (5th Cir. 1955), cert. denied 350 U.S. 836 (1955), rehearing denied 350 U.S. 905 (1955); *NLRB v. J. H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948), cert. denied 335 U.S. 814 (1948); *Sun Oil Co. of Pennsylvania*, 232 NLRB 7 (1977); *Magma Copper Co.*, 208 NLRB 329 (1974); *Sawbrook Steel Castings Co.*, 173 NLRB 381 (1968); *C & C Plywood Corp.*, 148 NLRB 414, 416-417 (1964), enfd. 351 F.2d 224 (9th Cir. 1965), reversed 385 U.S. 421 (1967); *Tucker Steel Corp.*, 134 NLRB 323, 332 (1961), and cases cited; *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949).

B. By unilaterally failing and refusing since January 13, 1982 (except for week ending March 17, 1982⁸), to make payments to the pension trust, welfare, vacation trust, and apprenticeship and journeyman training funds of, and reports relative thereto, to District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, Charging Party herein, as the duly designated exclusive collective-bargaining representative of the following unit of its employees appropriate for collective bargaining under Section 9(a) of the National Labor Relations Act, Respondent has changed and continues to change the terms and conditions of employment of said employees, and has refused and continues to refuse to bargain with said bargaining representative concerning the same, thereby violating Section 8(a)(5) of said Act:

All journeyman painters, apprentices and working foremen employed by the Employer at its 910 South Kirkwood Road, Kirkwood, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

C. Respondent has thereby also interfered with, restrained, and coerced, and continues so to do, its employees in the exercise of rights guaranteed in Section 7, thereby further violating Section 8(a)(1) of the Act.

D. Said unfair labor practices and each of them have affected, affect, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Respondent should be ordered to cease and desist from continuing to violate the Act in the respects found, and to make Charging Party Union whole, together with appropriate interest, for all payments due to the Union in relation to the funds in question, together with interest under the Board's current requirements. Respondent should also be required to preserve and make available to the Board's agents for inspection and copying all of its relevant books and records, for computation and compliance determination purposes. Posting by Respondent of the usual notice to employees should also be required.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Howard Barthelma Painting Co., Inc., Kirkwood, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing terms and conditions of employment of Respondent's employees in the following appropriate collective-bargaining unit, without first bar-

gaining in good faith concerning the same with District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, as the duly designated exclusive bargaining representative of said employees:

All journeyman painters, apprentices and working foremen employed by Respondent at its 910 South Kirkwood Road, Kirkwood, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make payments to said Union as required by Respondent's January 2, 1980-December 31, 1982 collective agreement (or any extension thereof) with said Union, for the period since January 13, 1982 (except for week ending March 17, 1982), on behalf of Respondent's said unit employees, with respect to said Union's pension trust fund, welfare fund, vacation trust fund, and apprenticeship and journeyman trust fund.

(c) Failing and refusing to supply to said Union all weekly or other reports on earnings and deductions of said unit employees, in accordance with the terms of said collective agreement, for said period since January 13, 1982.

(d) Thereby, as hereinabove set forth, or in any like or related manner failing or refusing to bargain or interfering with, restraining, or coercing employees in the exercise of their right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any or all such activities.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Forthwith make whole District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, for all payments due it since January 13, 1982, on behalf of Respondent's foregoing unit employees, under the aforescribed collective agreement, in regard to said Union's pension trust fund, welfare fund, vacation trust fund, and apprenticeship and journeyman training fund, together with interest thereon, in the manner set forth in the "Remedy" portion of the decision of which this Order forms a part.

(b) Forthwith supply said Union with all written weekly reports or earnings and deductions since January 13, 1982, in relation to said unit employees, as required by said collective agreement.

(c) Post at its premises at 910 South Kirkwood Road, Kirkwood, Missouri (or any current relocation thereof), copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained

⁸ See fn. 4, above.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT alter the terms and conditions of the employment with us of any employees who are represented for collective bargaining by District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL-CIO, without bargaining in good faith with that Union.

WE WILL NOT violate the provisions of the National Labor Relations Act, nor will we interfere with, restrain, or coerce employees in the exercise of the rights under that Act, by altering any term or condition of their employment or by failing to bargain collectively in good faith with their Union, or by unilaterally failing and refusing to make any payment or report required by any collective agreement with their Union, nor will we violate that Act in any like or related manner.

WE WILL pay to said Union, on behalf of its members in our employ who are covered by collective agreement with us, all moneys due since January 13, 1982, to the Union's pension trust fund, its welfare fund, its vacation trust fund, and its apprenticeship and journeyman training fund, plus interest; and WE WILL supply the Union with all weekly written reports due since January 13, 1982, under said collective agreement, on those employees' earnings and deductions.

HOWARD BARTHELMASS PAINTING CO.,
INC.